

***United States Court of Appeals
for the Second Circuit***



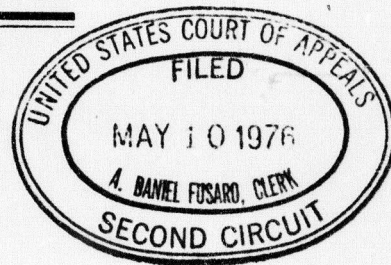
**APPELLANT'S
BRIEF**

ORIGINAL

76-7040

To be argued by
SCOTT E. MOLLEN

United States Court of Appeals
FOR THE SECOND CIRCUIT



MOHAMED ALI and NADIA ALI,

Plaintiffs-Appellants,

against

A & G COMPANY, INC. and SAADI IBRAHIM,

Defendants-Appellees.

BRIEF FOR PLAINTIFFS-APPELLANTS

HARRY H. LIPSIG, P. C.
Attorney for Plaintiffs-Appellants
100 Church Street
New York, New York 10007
(212) 732-9000

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Introductory Statement

This is an appeal from an order (#13)* entered in the office of the Clerk of the United States District Court, Southern District, on January 14, 1976 (Judge Lloyd F. MacMahon) dismissing the above-entitled action with prejudice against Plaintiffs-Appellants Mohamed Ali and Nadia Ali ("plaintiffs") for failure to prosecute, and from an Order (#23) entered in the office of the Clerk of the United States District Court, Southern District, on March 30, 1976 (Judge Lloyd F. MacMahon) denying plaintiffs' motion to vacate the order of dismissal.

From these orders, plaintiffs appealed to this Court respectively on January 28, 1976 and on April 15, 1976 by service and filing of Notices of Appeal (#14 and #21).

* All numbers refer to record on appeal.

It is most respectfully submitted that careful scrutiny of the full facts and circumstances surrounding this dismissal as well as an examination of the applicable law clearly demonstrates that the dismissal of this action for failure to prosecute and the subsequent denial of plaintiffs' motion to vacate the order of dismissal by the court below were most clear abuses of discretion.

In view of Defendants-Appellees ("defendants") blatant attempts to thwart proper pursuit of pre-trial discovery through wilful refusal to comply with proper pre-trial discovery demands and the most patent and improper employment of dilatory tactics, the Court below should have stricken the defendants' answers.

Statement of the Case

This is an action to recover damages for extremely serious personal injuries caused by botulism poisoning. The causes of action alleged in the complaint arose on or about February 13th or 14th, 1975 when tainted fish prepared and sold by the defendants was ingested by plaintiff Mohamed Ali.

Jurisdiction is based upon diversity of citizenship of the parties.

Plaintiffs first retained Harry H. Lipsig, P. C., to prosecute their claim on March 10, 1975. Suit was immediately instituted on that very same day.

Service of process on the defendants herein was completed by March 27, 1975. Issue was joined by service of the answer of defendant A & G Company, Inc. on June 24th, 1975 and of defendant Saadi Ibrahim, on October 2, 1975.

On May 14th, 1975, plaintiffs served a notice to take the oral deposition of defendants scheduling same for June 9th, 1975. Defendants thereupon prevailed upon plain-

tiffs to please accommodate them by adjourning said depositions. These depositions were subsequently adjourned four more times, *three* of which were the result of similar requests of defendants. Thus, *defendants* obtained four out of the five adjournments. As a result of these adjournments at the behest of defendants, no examinations were ever conducted, although plaintiffs continually pressed defendants for same and were ready to appear at a moment's notice.

Plaintiffs received interrogatories from defendant A & G Company, Inc., on July 30th, 1975 and promptly answered them on August 19th, 1975. On this date, plaintiffs served their interrogatories on defendant A & G Company, Inc., *which to date have never been answered.*

Although defendants claimed they were "unhappy" with plaintiffs' answers to their interrogatories at the pre-trial conference conducted before the Hon. Lloyd F. MacMahon on October 17th, 1975, *at no time prior thereto did defendants ever raise any objection to said answers to plaintiffs' counsel by motion or other form of notice.* Justice MacMahon ordered plaintiffs to supplement their answers. The additional information sought by defendants was promptly given in part to defendants immediately following the Pre-Trial Conference in the corridor of the Court-house and was thereafter followed with written supplemental answers on November 19th, 1975 when more information became available to plaintiffs' attorney (# 9).

During the course of the Pre-Trial Conference of October 17th, 1975, the Court criticized both sides for not having pursued or negotiated settlement prior to the conference, notwithstanding the fact that plaintiffs' representative advised the Court, without contradiction, that plaintiffs' firm was ready and willing to discuss and negotiate settlement, but that defendants insisted upon completion or oral depositions before they were willing to engage in any settlement discussions.

At the conference, the Court instructed the parties that all Pre-Trial discovery was to be completed by December 17th, 1975 and that the case was to be placed on the ready day trial calendar on January 9th, 1976.

From the date of the conference, October 17th, 1975, plaintiffs' counsel, by telephone, repeatedly attempted to settle this case and/or obtain a date for pre-trial examinations of all parties. Notwithstanding plaintiffs' conscientious efforts, defendant, A & G Company, Inc. refused to cooperate and continually pleaded "give us a few days and we'll work it out", "etc".

In a most sincere effort to avoid burdening the District Court (which bears enough of a workload without the unnecessary added burden of motions concerning routine discovery matters) plaintiffs' counsel did not raise this matter with the Court until January 8th, 1976 when an urgent conference with the Court was sought. Counsel for plaintiffs appealed to the court below for an extension of time so that discovery could be completed and the case disposed of without having to waste the District Court's valuable time unnecessarily, but our request was refused. On January 9th, 1976, this action appeared on the ready day calendar with approximately six cases ahead of it.

Plaintiffs' counsel conscientiously attempted to reach the plaintiffs by telephone without success on the 9th, 13th and 14th days of January, 1976 to advise of the impending trial.

On January 14th, 1976, Wednesday morning, at 10:40 A.M., plaintiffs' law firm received a telephone call to appear and open the trial at 11:00 A.M. At the appointed time, representatives of the office appeared before Mr. Justice Lloyd MacMahon to advise that plaintiffs' trial attorney, who was scheduled to try the case and was the only trial attorney fully familiar therewith, was at that moment engaged on trial in the Supreme Court of the State of New York for the County of New York; that plaintiffs had not

been reached and were therefore unavailable; and further that one of the defendants, Saadi Ibrahim, and his attorney, Norman C. Harlowe, were also not present and to therefore request a short adjournment of the trial herein once again.

Notwithstanding that the within action was in litigation for a mere ten months and issue was joined with one defendant only *6 months* prior thereto and issue was joined as to the other defendant only *3 months* prior thereto, the court below dismissed the case for failure to prosecute.

On February 26, 1976, counsel for the plaintiffs served motion papers (#16 through 20) on the defendants herein asking the trial court to vacate its prior order of dismissal.

On the return date, March 9, 1976, counsel for the plaintiffs appeared and attempted to present all the relevant facts before Judge MacMahon. The Judge completely refused oral argument on the motion and commented merely that he "would review the motion papers." His order denying this motion to vacate reflects the same lack of consideration as to the full factual background in this matter that gave rise to his first order of dismissal.

Plaintiffs promptly appealed therefrom.

Plaintiffs have a good and meritorious cause of action. See Exhibit "A" annexed hereto. Evidence recently received from the United States Food and Drug Administration establishes that the Defendants were marketing and selling contaminated and poisonous fish. A copy of the material received is attached hereto as Exhibit "B".

Question Presented

Under the full circumstances herein, did the court below abuse its discretion by dismissing the within action for failure to prosecute and by denying plaintiffs' motion to vacate?

POINT I

In view of the full facts and circumstances herein, the District Court's order of dismissal was a clear abuse of discretion.

Plaintiffs most respectfully contend that a careful review of the complete history of this litigation clearly demonstrates that plaintiffs have diligently sought to bring this action to a rapid conclusion. Indeed it is ironic that the order of dismissal of this Court would permit defendants to elude liability and thus reap reward as a result of their own dilatory conduct.

In view of the fact that it is well established that a dismissal without prejudice is a harsh sanction and should be resorted to only in extreme cases and that in determining whether to dismiss a case for want of prosecution, the trial judge must be ever mindful that the policy of our law favors the hearing of a litigant's claim upon the merits, *Davis v. Operation Amigo Inc.*, 378 F.2d 101 (10 Cir. 1967); *Dyotherm Corporation v. Turbo Machine Co.*, 392 F.2d 146, app. dism. on other grounds, 434 F.2d 65 (3 Cir. 1968), plaintiffs most respectfully suggest that the court below failed to thoroughly examine the complete factual background herein. An analysis of the history will show that the court below dismissed the case only six months after issue was joined as to one defendant and three months after the issue was joined as to the other defendant. Plaintiffs respectfully contend that this case was barely ripe for pretrial discovery, let alone for trial. Through no fault of the plaintiffs, examinations before trial were never held, and further, the defendant A & G Company, Inc., never even answered the plaintiffs' interrogatories. The arbitrary and unwarranted action of the court below in dismissing the case has allowed defendants to reap the benefit of their own dilatory tactics.

Plaintiffs believe an examination of illustrative cases as to what is an "abuse of discretion" is most supportive of plaintiffs' position herein.

In *DeMeulenaere v. Rockwell Mfg. Co.* (USDC SDNY, 1960), 31 FRD 575, aff'd 312 F. 2d 209, cert. denied 374 US 813, 83 S.Ct. 1704, an action was brought in 1952 for treble damages over an alleged conspiracy by the defendants to destroy the plaintiff's cash register business. The case appeared on the assignment calendar twice, and was stricken in 1956. The case then appeared on the dismissal calendar four times but each time the plaintiff got an extension of time to file a note of issue on one excuse or another.

In 1960, the case was finally dismissed for want of prosecution. The Court indicated that when a plaintiff courted his dismissal for several years, had not proceeded with due diligence to prosecute the claim, had done nothing at all during certain periods, had disregarded orders and admonitions of the Court and had wasted two years by deceiving the Court, this was a proper case of dismissal. Judge Cashin, in his opinion said:

"I am fully aware of the seriousness of dismissing this action with prejudice for lack of prosecution. It would deny plaintiffs' their day in Court and this is not desirable. As Chief Judge Clark stated in *Gill v. Stelow*, 240 F.2d 669, 670 (2 Cir. 1957): 'In final analysis, a court has the responsibility to do justice between man and man; and general principles cannot justify denial of a party's fair day in court except upon a serious showing of wilful default. Even though that case involved a dismissal under Rule 37 (d) of the Federal Rules of Civil Procedure and did not involve Rule 41(b), Chief Judge Clark's warning that a court should not dismiss an action with prejudice except on very substantial evidence, should not be taken lightly.'"

It is respectfully suggested that the evidence of the procedural history of the case at bar is not sufficient to sustain a dismissal for failure to prosecute under the doctrine set forth in *DeMeulenaere, supra*, the plaintiffs herein are being unjustly denied their day in court by reason of the stalling maneuvers of the defendants, i.e., in their failing to answer plaintiffs' interrogatories and appear for examinations before trial.

In the case of *Foxboro Co. v. Fischer & Porter Co.* (USDC E.D. Pa. 1961), 29 FRD 522, the action was brought for patent infringement. The District Court properly refused to grant the defendant's motion to dismiss for failure to prosecute where the defendant was largely responsible for the delay. The action was commenced in April, 1958. The plaintiff's last act was to file the plaintiff's supplemental notice of taking depositions on July 22, 1959. The District Court Clerk sent notice to the parties on July 24, 1961 that, pursuant to local rules, the case would be dismissed without prejudice where no action was taken by the parties for two years. When the defendant moved to dismiss, the plaintiff alleged that the defendant had induced the plaintiff to proceed slowly with prosecution while they tried to settle the case. The Court denied the motion to dismiss.

In the case at bar, the plaintiffs have always been ready to discuss settlement with the defendants and noted so at the first pre-trial conference held before the Hon. Lloyd F. MacMahon on October 17, 1975. The defendants on the other hand refused to discuss settlement until after completion of examinations before trial. The plaintiffs refrained from proceeding against the defendants even following the deadline for completions of discovery because defendants continually assured plaintiffs' counsel that depositions would be held and settlement negotiations thereafter could commence.

Alamance Industries Inc. v. Filene's (1st Cir. 1969), 291 F.2d 142, illustrates further criteria for defining abuse of discretion. In this case, a patent infringement action, the District Court was confronted with several different actions against different defendants in different jurisdictions by the same plaintiff arising from the same patent infringement. The plaintiff requested that a particular action be held in abeyance until issues in one of the other actions in another jurisdiction was decided. The District Court judge denied this request saying:

" . . . when you come here, you come here to a judge that disposes of business promptly for the public interest regardless of the private interests. I am not going to have a case—I don't care what any other judge has—which lasts on my docket an inexcusably long period of time . . ." (The case had been on the docket fourteen months).

The First Circuit Court of Appeals stated the following at page 145:

"Apparently what principally lay behind the district court's determination to try the case is to be found in its remark, made at the first hearing, that the 'public interest' of not having a case lie on its docket for fourteen months must control 'regardless of private interests'. We cannot accept this statement either as the formulation of a generally applicable principle or as a proper criteria for the disposition of this particular case. *Courts exist to serve the parties, and not to serve themselves, or to dispatch of business.* Complaints heard as to the law's delays arise because the delay has injured litigants, not the courts. For the Court to consider expedition for its own sake 'regardless' of the litigants is to emphasize secondary considerations over primary". (emphasis added)

In the instant context, the order of the court below would appear to serve itself rather than the litigants and our system of jurisprudence. The facts, as outlined elsewhere, demonstrate that no one has been prejudiced by the short passage of time herein, except Plaintiffs whose case has been dismissed. Indeed, their only legal remedy for the injuries they have suffered has unjustifiably been denied them. This is an abuse of discretion under the criteria of *Alamance, supra*.

In *Dyotherem Corporation v. Turbo Machine Co., supra*, the complaint for breach of agreement was filed August 29, 1962. On October 4, 1965, the date set forth trial, plaintiff's counsel appeared late and requested a continuance on the ground that the plaintiff's principal witness was ill. The Judge set the action over until the next day, when counsel again appeared late and unprepared to proceed. The defendant moved to dismiss and the Judge granted the dismissal for failure to prosecute.

In its opinion, reversing the District Court's decision, the Court of Appeals for the 10th Circuit said at 329 F.2d 148:

"Dismissal is a harsh sanction which should be resorted to only in extreme cases. The power of the Court to prevent undue delays and to control its calendars must be weighed against the policy of law which favors disposition of litigation on its merits. *Link v. Wabash R.R. Co.*, 1962, 370 US 626, 82 S.Ct. 1368, 3 L.Ed. 2d 734; *Meeker v. Rizley*, 10 Cir. 1963, 324 F.2d 269; 5 Moore, Federal Practice para. 41.11 [2] 3, (2d ed.)"

In *Carnegie National Bank v. City of Wolf Point* (9th Cir. 1940), 110 F.2d 559, the Court ruled that the mere lapse of time does not justify dismissal if the plaintiff had not been lacking in diligence. Again, plaintiffs herein point to their Statement of Facts to indicate their "track

record" with respect to the conduct of this case. There has been no lack of diligence, no intentional delaying of this case, and no reason to dismiss for failure to prosecute. The facts do not depict a prolonged drawn out history of a plaintiff deliberately proceeding in a dilatory fashion, as in the case of *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1926).

Finally, in *Davis v. Operation Amigo, Inc.*, *supra*, the complaint was filed on December 10, 1965; an order of attachment was issued the same day. Two of the defendants answered on December 27, 1965 while the remaining defendants answered on January 13, 1966. Plaintiffs replied to counterclaims on January 17, 1966. The case was set for trial on the merits on March 3, 1966. On February 28, 1966 a new trial date of March 29, 1966 was set. On March 28, 1966, plaintiff's counsel moved for a continuance because of the illness of the plaintiff. The Court overruled the motion and dismissed the complaint, giving judgment to the defendants on their counterclaims. On the appeal, the Circuit Court said that the dismissal was less than four months after the case was filed and about two months after it reached issue. It was apparent that discovery was only completed shortly before dismissal and was certainly not completed by March 3, 1966, the date initially set for the trial. The Circuit Court ruled that "dismissal came at a time when the case was barely ripe for pre-trial."

Plaintiffs respectfully reiterate that the history of the litigation in the instant action is not very dissimilar from that presented in *Davis*, *supra*, and that it too was "barely ripe" when it was dismissed by the Court below.

POINT II

The District Court's decision denying Plaintiffs' motion to vacate completely ignores the full factual history herein.

Shortly after Judge MacMahon's order of dismissal, plaintiffs made a motion to vacate said order of dismissal returnable before Judge MacMahon. On the return date, March 9, 1976, plaintiffs' counsel attempted to call to Judge MacMahon's attention many salient facts which he believed Judge MacMahon failed to consider in his order of dismissal. Upon counsel's first words of argument, the Judge curtly informed counsel that the Judge had heard all he wanted to hear and would not accord counsel any opportunity to offer oral argument but would review the motion papers. These papers were similar to the present appeal brief and outlined the same facts and law.

On March 30, 1976, Judge MacMahon issued memorandum number 44139 (# 23) denying plaintiffs' motion to vacate the order of dismissal.

The memorandum decision cavalierly ignored the salient fact that the inability to proceed to trial was a direct result of *defendants'* not plaintiffs', dilatory litigation tactics, stating:

"The moving affidavit is long on baseless unwarranted and argumentative criticism of this court but remarkably short on facts warranting a finding of justifiable excuse for plaintiffs' failure to be ready for trial in accordance with the pre-trial order and this court's refusal, three times over a six day period, to grant an adjournment."

In view of the extensive detailed history of defendants' deliberate efforts to circumvent and elude pre-trial discovery, discovery that was necessary to proceed to trial,

the foregoing paragraph of Judge MacMahon's decision is patently inaccurate and unwarranted.

If plaintiffs have committed a wrong, that wrong consisted of two acts, i.e. (a) extending professional courtesy to a fellow brother of the bar in acceding to his request to adjourn depositions and (b) in view of what has transpired, demonstrating too great a reluctance to burden the court with motions to impose sanctions for failure to meet routine and proper pre-trial discovery demands.

Plaintiffs certainly share Judge MacMahon's concern for obviating unnecessary calendar "log jams" and fully recognize that such "log jams" may preclude other litigants from having their day in court. However, the facts and history of this particular litigation do not warrant the denial of these litigants' day in court. Effective administration of our courts is certainly an important need and goal, but it must not be used as an excuse to prevent and foreclose plaintiffs herein from being accorded their day in court.

Conclusion

In view of the history of this litigation as set forth herein, plaintiffs have at all times in a spirit of cooperation diligently and expeditiously sought to bring this action to a rapid conclusion. It is most ironic that the order of dismissal of the District Court permits defendants to escape liability and thus rewards them for deliberate dilatory behavior.

Plaintiffs have a good and meritorious cause of action. See Exhibit "A" annexed hereto.

Evidence received recently from the U. S. Food and Drug Administration conclusively proves that the defendants were marketing and selling contaminated and poisonous fish. See Exhibit "B" annexed hereto.

To deny plaintiffs their day in Court as a result of defendants' willful refusal to cooperate would *not only be antithetic to the interests of justice, but contrary to the intent of the Federal Rules of Civil Procedure*. The instant case was in litigation for a mere ten months and was dismissed six months after the joinder of issue with one defendant and three months after the joinder of issue with the other defendant. To dismiss for failure to prosecute under the complete circumstances presented herein constitutes a clear abuse of discretion.

It is most respectfully submitted that the rights of these litigants should *under these circumstances* take precedence over the Court below's concern as to decongestion of its calendar.

In view of all of the foregoing, it is respectfully submitted that the order appealed from should be reversed in all respects.

HARRY H. LIPSIG, P. C.
Attorney for Plaintiffs-Appellants
100 Church Street
New York, New York 10007
(212) 732-9000

Exhibit A, Affidavit of Mohamed Ali.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MOHAMED ALI and NADIA ALI,

Plaintiffs,

—against—

A & G COMPANY INC. and SAADI IBRAHIM,

Defendants.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MOHAMED ALI, being duly sworn, deposes and says:

I am one of the plaintiffs in the above entitled action and am fully familiar with the facts and circumstances herein.

I make this affidavit in support of my motion to vacate this Court's order of January 13, 1976.

I reside with my wife, Nadia Ali, at 141-09 84th Drive, Jamaica, New York. I am an American citizen and my wife is an Egyptian citizen and we both lawfully reside in the United States.

On or about February 13th or 14th, 1975, my wife asked a friend to purchase some fish at the store of the defendant, A & G Company Inc. in Jersey City, New Jersey. The fish was purchased that day and brought directly to my house where my wife placed it in to a jar of vegetable oil and refrigerated it.

On Saturday evening, February 15th, 1975, I ate the fish for dinner. When I awoke on Sunday, February 16th, 1975 I started to feel pain and discomfort in my stomach.

Exhibit A, Affidavit of Mohamed Ali.

When I got up on Monday, February 17, 1975, I was having great difficulty breathing and was taken to Queens Hospital Center where I was admitted for botulism type E poisoning. This strain, I have been informed, comes from eating tainted fish.

I was discharged almost a month later on March 15, 1975. In addition to being caused substantial medical bills (\$3,400.00), I have been caused to suffer the loss of salary in the amount of \$2,400.00 and my business, The Amal Parking Corporation, has lost grievously by having to hire a replacement for me.

I have examined the reports of the U. S. Food and Drug Administration, which were prepared as a result of my illness, in which they state that they found the fish to be tainted with botulism E strain.

I verily believe that I have a just and proper cause of action against the defendants herein.

To deny me my day in Court would work a substantial injustice against me.

MOHAMED ALI

(Sworn to by Mohamed Ali, February 25, 1976.)

Exhibit B, Laboratory Reports.

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A. & G Company
Jersey City, N.J.
El 2/23/75 LHR

SUMMARY OF FINDINGS

This inspection was conducted as a follow-up to NWK, Act. Dir. IBR, NWK/Supv memo 2/23/75. The assignment reported a botulism poisoning of a Queens, New York City, N.Y. resident, Muhammed Ali, who consumed some Fsikh, a salted preserved mullet. He was hospitalized in New York City within 5 hours of ingestion. Serum showed the toxin to be Botulism Type "E". Alleged source of the Fsikh fish was this firm. NWK-DO contacts with the firm on 2/22/75 identified a Mr. Saadi Ibrahim, Ridgefield Park, N.J. as the manufacturer. A sample of four Fsikh fish was collected by NWK-DO on 2/22/75 at this firm. (058-953H).

This inspection revealed that the firm is a family owned/operated firm operating as a local specialty Egyptian grocery store servicing the Egyptian neighborhoods of Jersey City and surrounding areas. Between 1/7 and 1/14/75, the firm received a lot of approximately 66 lbs. of Fsikh from the manufacturer Mr. Saadi Ibrahim, Ridgefield Park, N.J., contained in 3 used unlabeled plastic containers.

Management of A & G Company did not have any records to document receipt of the bulk Fsikh fish. Checkbook stubs showed 2/3/75 payment \$115.50 for the January shipment. The next preceeding Fsikh bulk purchase from Saadi Ibrahim had been in April 1974. No records exist to document this. Checkbook records show two payments to Saadi in October and November 1974 said to have been for the April 1974 delivery.

Management said that they sold retail only approximately 54 lbs. of the approximate 66 lbs. received. From memory, they were able to identify only nine of their customers of Fsikh fish. During the course of the inspection two additional customers were identified as a result of the recall notification efforts, for a total of 11 identified out of 15 to 20 possible customers. The firm's management estimated the possible number of customers.

Management decided to voluntarily recall and posted recall notices in English and Arabic in their store on 2/23/75. They verbally notified all customers of the recall and stock sample request beginning 2/23/75. Management conducted a total telephone recall notification and stock remnant survey; 2/22/75 with the nine customers they identified and one of the two customers later identified, On 2/23/75, no stock was located and no illnesses reported.

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Exhibit B, Laboratory Reports.

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A & G Company
Jersey City, N.J.
EI 2/23/75 LHR

The store manager and owner, who are husband and wife, signed FD 463a, affidavits stating the facts of their operations and all aspects of their purchase and sale of the Fsikh fish.

This inspection revealed no additional stocks of Fsikh fish within the store.

HISTORY OF BUSINESS

A & G Company is operated as a retail grocery store under the sole ownership of Mrs. Wafa Ghaly. Her husband Mr. Adel Ghaly is manager of their grocery store which specializes in Egyptian food products, primarily.

Mrs. Wafa Ghaly stated that all ownership papers are in her name, only, but copies of these documents were not available. Mr. Adel Ghaly confirmed this information.

The store operations, located at 205 Sip Ave., Jersey City, N.J. sells only to the retail trade customers, generally residents of the local Egyptian community within Jersey City. Storage room facilities for the store are located in an unused store front located diagonally across the street on Garrison Street adjacent to the North East corner with Sip Avenue. The Ghaly family resides 4 blocks away at 2700 Kennedy Blvd., Apt 411, Jersey City where the business office for the store is maintained. The firm's books and records are maintained in a desk with file drawers, located in the anteroom section of their living room.

The majority of the food products sold in bulk or individually packaged units are from various import suppliers. Some bulk specialties are from various commercial domestic bulk sources. Among the Egyptian specialty products sold by this store is Fsikh, an ancient Egyptian food which is salted, preserved mullet (salt water fish).

This is the initial inspection of the firm and there is no previous FDA history on the firm.

Newark District Investigator Jennifer Jones sampled all remaining known stock of Fsikh fish, four fish with liquid in the original container, on 2/22/75 as sample #058-953H.

Exhibit B, Laboratory Reports.

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A & G Company
Jersey City, N.J.
EI 2/23/75 LHR

PERSONS INTERVIEWED

At the initiation of the inspection, I was accompanied by Inspector Dominick Adase. We initially visited the store location, 205 Sip Avenue, but it was closed. I then telephoned Mr. Adel Ghaly at his residence, 2700 Kennedy Blvd., Apt 411. Mr. Ghaly invited us into his residence where he stated that all of his store business office records were maintained.

Upon arrival at the Ghaly apartment, Inspector Dominick Adase and I presented our credentials to, and issued the FD 482 Notice of Inspection to Mr. Adel Ghaly, manager of the A & G Company. Later we were joined by FDA Investigators Samuel Jones and Anthony Amitrano, at which time they presented their credentials and we issued another FD 482 Notice of Inspection bearing all 4 signatures. While the other 3 investigators were present, Mr. Ghaly identified the suspected product to be the Fsinh fish.

Mr. Ghaly explained the use of the product in the home and how he sold it, briefly. He also identified the known customers as he had been able to recall them. Information developed which identified that Mrs. Wafa Ghaly, wife of Mr. Adel Ghaly, was the owner of record of the A & G Company. The other 2 FDA Investigators and the Inspector departed to visit the known consignees to conduct recall effectiveness checks. I issued another FD 482 Notice of Inspection to Mrs. Wafa Ghaly as owner of the A & G Company. The preceding FD 482's Notices of Inspection were issued to the A & G Company at the 2700 Kennedy Blvd., Apt. 411 address because it was the company office.

When I then continued the inspection at the store location at which time I issued a FD 482 to Mr. Adel Ghaly, as the most responsible person present. Shortly thereafter Mrs. Wafa Ghaly was present and I issued another FD 482 to her at the store address, as the owner of the firm. Upon completion of the inspection at the store locations the inspection continued, after a brief interruption to cover other assignments, at the Ghaly apartment residence.

All of the inspectional operations conducted at the Ghaly apartment residence were with the full cooperation and upon the direct invitation of Mr. & Mrs. Ghaly because they did not wish to conduct long discussions in their crowded store, as well as the greater comfort available at the apartment.

Mr. Adel Ghaly and Mrs. Wafa Ghaly participated voluntarily in all aspects of this inspection and investigation. They both exhibited full and complete cooperation.

Exhibit B, Laboratory Reports.

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A & G Company
Jersey City, N.J.
EI 2/23/75 LHR

Mr. Adel Ghaly furnished virtually all of the information contained in this report other than that obtained thru direct observations. He provided access to all records, such as were available or maintained.

I directed questions in several subject areas to Mrs. Wafa Ghaly who consistently deferred to her husband for the information because he is the primary responsible person who operates the firm on a day to day basis.

At the conclusion of the inspection, both Mrs. Wafa Ghaly, and Mr. Adel Ghaly voluntarily agreed to and signed extensive FD 463a affidavits detailing business operations and responsibilities as pertinent to the suspected botulism follow-up investigation related to the Fsih fish that they sold in their store. The affidavits accompany this report as exhibits #7 & 8.

During a portion of the inspection at the store location and storage store location, I was voluntarily accompanied by Mr. Ralph J. Campana, Chief Sanitary Inspector, Jersey City Division of Health, 280 Grove Street, Jersey City, N.J. Phone number H24-3600 ext 30. He appeared during the course of the inspection and volunteered to assist me because of his interest and involvements on 2/22/75.

Late in the afternoon of 2/23/75, I was joined by Dr. Ronald Altman, New Jersey State Department of Health Epidemiologist, Trenton, N.J. and his associate, Dr. Hageeh Istafahous, employed normally at N.J. Dept of Health VD Clinic in Newark. Dr. Altman explained that Dr. Istafahous was assisting him in these investigations both as a professional and as an interpreter of the Arabic language. They obtained additional information for their investigations.

OPERATIONAL RESPONSIBILITIES

Mrs. Wafa Ghaly stated that she is the owner of the A & G Company which operates as an Egyptian specialty food grocery store. She stated that her husband Adel Ghaly is responsible for all operations of their grocery store and that he purchases all food and merchandise sold in the store. She continued, stating that Adel Ghaly operates the store on a day to day basis and does a lot of the direct sales to the retail customers.

Mrs. Wafa Ghaly stated that she does not participate in the operations of the A & G Company. She stated that only on a very irregular basis will she occasionally work in the store performing some retail sales.

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A & G Company
 Jersey City, N.J.
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Mrs. Ghaly stated that she is employed full time as a bookkeeper at Merrill Lynch, Pierce, Fenner, and Smith, 1 Liberty Plaza, New York, N.Y. 10006. She stated that both Adel and herself have full authority to sign all checks for all debts owed by the firm. However in fact only Adel writes and signs all checks and pays the bills.

Adel Ghaly concurred with the preceeding statement and admitted to full responsibilities as described in preceeding paragraphs. I observed that all of the checkbook stubs appeared to be in Adel Ghaly's handwriting. I also observed him functioning with full operational authority in the store operations during the course of the inspection.

Mr. Adel Ghaly stated that his assistant, Magdi Mahfouz operates the store in his absence and is usually always present when the store is operating.

PRODUCT LIABILITY INSURANCE

Mr. Adel Ghaly stated that he has full product liability insurance in a policy issued by the Allstate Insurance Co., home office Northbrook, Ill. thru the local agent, Edward J. Fox, Accounting Agent, 65 *Stip Ave.* Jersey City, N.J.

Mr. Ghaly showed me the policy: Policy # 39 593 398 BPP; Policy period 7/19/74 to 7/19/77; Amounts: \$300,000.00 each occurrence; Comprehensive General Liability including product insurance.

PURPOSE OF INSPECTION

This inspection was conducted as follow-up to a reported botulism type illness occurrence in an individual named Mahamed Ali, located in Queens, N.Y., N.Y. Reportedly Mr. Ali consumed some Fsikh fish which had been purchased from this firm A & G Company, and manufactured by a Saadi Ibrahim, 145 South Ave., Ridgefield Park, N.J.

Preliminary investigation by Newark District revealed that a lot of Fsikh fish had been manufactured in a residential home by Saadi Ibrahim and sold to the A & G Company grocery store sometime in December 1974 or January 1975.

GENERAL STATEMENT

Mr. Adel Ghaly provided the information contained in the following paragraphs describing the firm's operations relevant to his receipt and sales of the Fsikh fish.

The majority of this information is provided in an affidavit FD 463a included with this report as exhibit #8.

Exhibit B, Laboratory Reports.

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A & G Company
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Between January 7 and 14, 1975 the store received a shipment of approximately 66 lbs. of Fsikh fish from a manufacturer- Mr. Saadi Ibrahim, 145 South Street, Ridgefield Park, N. . The Fsikh was delivered by Mr. Saadi Ibrahim in his personal automobile. Mr. Ghaly said that the fish was received at the store either by himself or a former employee, Mr. Sadeh Paulus, but did not recall the exact circumstances.

Mr. Ghaly said that Mr. Ibrahim told him that he (Saadi Ibrahim) personally made the Fsikh in his residence.

Mr. Ghaly continued stating that the shipment of fish was received in 3 plastic, closed containers, each containing approximately 20 to 22 lbs. of fish each. He stated that he did not have any records to document or remind himself of the exact date of receipt of the Fsikh or whether the store received all 3 containers at the same time or on different dates between 1/7 and 1/14/75. He said that the containers were 5 gallon capacities with the salted fish Fsikh stuffed right inside to full capacity. Verbally, Mr. Ghaly stated that the plastic containers were reused 5 gallon containers with plastic screw caps which previously might have contained bulk imported olives or grape leaves. He could not remember whether he might have given these containers to Mr. Ibrahim at sometime previous. According to Mr. Ghaly he stated that Mr. Ibrahim could also have obtained these containers from one of many other sources. He continued stating that when he opened these containers of fish, they contained a salted liquid brine, as well as the fish. He stated that he never observed any evidence of the salt used by Ibrahim.

Mr. Ghaly continued by stating that he sells the fish directly from the containers, as received from Mr. Ibrahim. He stated that he did not do any processing of the fish after it was received at the store. He stated that he or his employees did not add anything into the containers and did not do anything to alter or change the product while he had it in the store.

Mr. Adel Ghaly stated that he paid Mr. Saadi Ibrahim on 2/3/75 with his store check #807 in the amount of \$115.50 for fish. He stated that he did not have the cancelled check returned from the bank, but that it was expected back on/after 3/5/75. He stated that he did not have any other records to document the January 1975 transaction. He usually pays Mr. Ibrahim \$1.75 /lb for the Fsikh fish. Mr. Ghaly provided me a copy of the store's current checkbook containing stubs beginning in June 1974. The check account is number 0270-0040-04-01-5818 in the name of "A & G Company, 205 Sip Avenue, Jersey City, N.J. 07306" at the bank "The Trust Company of New Jersey, Journal Square, Jersey City, N.J. 07306".

Exhibit B, Laboratory Reports,

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A & G Company
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Mr. Adel Ghaly stated that he only purchased same Fsikh fish once from Mr. Ibrahim prior to 1/7/75. This single prior purchase occurred sometime in April 1974, but Mr. Ghaly stated that he does not have records to document the purchase or refresh his memory. He did state that he could not pay Mr. Ibrahim until October 1974. His checkbook record stub shows that Mr. Ghaly issued check #612 on 10/22/74 to "Saadi" for fish in the amount of \$88.25. The checkbook stubs also showed an undated stub for check number 674 to Mr. Saadi in the amount of \$45.00. Based on the check record stubs the check #674 was written sometime between 11/24/74 and 11/26/74. Mr. Ghaly stated the two checks totaling \$133.25 are the two payments covering the Fsikh fish purchased and received from Mr. Ibrahim in April 1974. Mr. Ghaly stated that he did not have the cancelled checks #612 and #674 in his possession. He stated that the cancelled checks are in the possession of his accountant Mr. Fayek Aziz, 91 Romaine Ave., Jersey City, N.J. (Resident Address) Reportedly he has offices in New York City, Manhattan, N.Y., address and firm name unknown to him.

Mr. Ghaly stated that he does not remember purchasing any Fsikh fish from Mr. Saadi Ibrahim prior to April 1974 because he did not know Mr. Ibrahim prior to that approximate date.

FSIKH PREPARED HISTORY

Mr. Ghaly stated that Fsikh is a 2000 year old ancient Egyptian food prepared by using whole fresh mullet fish, partially drying it, stuffing all openings with salt, and then placing it into the containers.

He said all Egyptians know and relish Fsikh, and are aware of the following facts and handling precautions:

- (1) They know it is bacteria cured.
- (2) They know it should not be kept out of salt.
- (3) Should not keep it long because it smells.
- (4) Usually eaten immediately upon opening and cleaning.

Fsikh is eaten very heavily between Good Friday and Easter Sunday, and to lesser extent only in the preceeding 2 month seasonal period, according to Mr. & Mrs. Ghaly.

Exhibit B, Laboratory Reports.

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A & C Company
Jersey City, N.J.
EI 2/23/75 LHR

JANUARY 1975 SHIPMENT SALES ACCOUNTABILITY/CUSTOMER/CONSIGNEE LIST

Mr. Ghaly stated that he could have sold the 66 lb. lot received between 1/7 and 1/14/75 to any of his retail customers on a direct walk in basis between time of receipt and time of notification of the suspected botulism contamination problem 1/22/75. He stated that he could provide the following accountability:

Received - 66 lbs., approx.

2/22 Sampled by N.J. State - 2 fish/4 lbs. total

1/22 FDA Sample - 4 fish/8 lbs. total

Not to be accounted for = 54 lbs. which is equivalent to about 27 fish.
Each customer would buy 1 or 2 fish/2 lbs. each.
Hence approximately 15 customers may have purchased Fish from the January 1975 shipment.

Mr. Ghaly stated that he could only remember the names of 9 customers and was able to obtain their telephone numbers. He telephoned all 9 customers on 2/22/75 to inform them of the contaminated fish and dangers involved. He stated that he was told that all these customers informed him that they had eaten all of the purchased fish and no one had been made ill. None of the fish remained in consumers hands, according to Mr. Adel Ghaly. On 2/23/75, in our presence, Mrs. Wafa Ghaly again called all nine known customers to obtain their addresses. Mr. & Mrs. Ghaly furnished the following list of nine known customers who purchased the Fish. They were unable to identify anyone else, although they admitted that there were other customers.

They stated that generally their customers lived within the Jersey City Egyptian community, within an approximate one mile radius of Journal Square and their store. Mr. Ghaly stated that he does not have any lists of customers and does not have any credit charge account lists.

GHALY LIST

- (1) Ashraf Ghobrial, 2560 Kennedy Blvd., Apt. 202, Jersey City, N.J.
Phone 333-6344. Purchased approximately 2/9/75.
- (2) Sabri Risk, 2700 Kennedy Blvd., Apt. 103 or 101, Jersey City, N.J.
Phone 333-0834. Purchased approximately 2/3/75.
- (3) Samir Elrigshidy, 165 West 25th Street, Bayonne, N.J.
Phone 437-2379. Purchased approximately 2/2/75.

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A & G Company
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- (4) Ramboise Avadella, 96 North Ave., Bayonne, N.J. 2nd Floor
Phone 823-0813. Purchase date - unknown
- (5) Edward Chobrial, 770 Seventh Street, Secaucus, N.J. 07094
Phone 363-4881. Purchased approximately 1/23/75.
- (6) Karam Lawandy, 264 Clendenny Ave., Apt. C, Jersey City, N.J.
Phone 433-7386. Purchased approximately 2/8/75.
- (7) Ramsis Saliman, 30 Pensington Ave., Apt. 404, Jersey City, N.J.
Phone 451-2801. Purchased approximately 2/2/75.
- (8) Lotfy Wasset, 700 B Newark Ave., Apt. 316, Jersey City, N.J.
Phone 798-7819. Purchased 2/16/75.
- (9) Turkey Emil, 35 Van Reipen Ave., Jersey City, N.J.
Phone 963-9061.

The following name was obtained by Investigator Sam Jones during a visit to a local church, prior to returning to the Ghaly store office. The name was also given to Mr. Ghaly by Mr. Jones.

- (10) J. L. Doss, 627 Summit Ave., Apt. C, Jersey City, N.J.
Initially it was reported that Mr. Doss had 3 Fsikh fish in his freezer, but follow-up investigation failed to confirm this.

The following person called Mr. Ghaly at 7:15 P.M. 2/23/75 to state that she had purchased some Fsikh fish on 2/15 or 2/16/75 and that she and four or five family members had eaten the Fsikh on 2/16/75. Noone was known to have been made sick. No fish remained.

Mrs. Illin Gurgis, 53 Prospect St., Jersey City (Heights), N.J.
Phone 963-8587.

RECALL RELATED INFORMATION

In addition to previously described recall procedures employed, Mr. Adel Ghaly voluntarily placed the two page recall notice that we had provided, in his store and on the door of the store. He voluntarily had his employee write a message in

Exhibit B, Laboratory Reports.

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A & G Company
Jersey City, N.J.
EI 2/23/75 LHR

Arabic in the face of the notifications posted in his store. The arabic portion explained the recall and instructed everyone who had purchased and/or eaten the Fsih to notify him at the store. He listed the store telephone number for communication purposes. Exhibit #9 is the recall notification as posted in the store.

Also, Mr. Ghaly and his assistant Mr. Magdi Mahfarz personally spoke to all customers who came into the store on 2/23/75 and promised to continue to do so for at least a week. They verbally informed them of the recall and dangers, and requested their names and addresses if they had purchased any Fsih. Mr. Ghaly stated that they would telephone Newark District (Paul Wiener, or Edward Wilkens or Investigator Rosen) and furnish the additional names, if any were encountered.

STORE STOCK INSPECTION

All areas of the store were inspected in an attempt to locate additional stock of the Fsih located. No remaining stock was located within the store or its storage areas.

COMPLAINT FILE REVIEW

Mr. Ghaly does not maintain a complaint file. He stated that he has never heard anyone complain of illness or injury caused by consumption of the Fsih sold at his store.

PROMOTION AND DISTRIBUTION

Sales are done on a direct retail basis from this single location grocery store A & G Company according to Mr. Adel Ghaly. He stated that he does not sell to anyone else for resale. He concluded by stating that, to the best of his knowledge all of his customers reside in the general area of Jersey City, but that there are customers that he does not know.

ADJUDICATION

Note. Mrs. Wafa Ghaly and Mr. Adel Ghaly cooperated completely and furnished all information requested during this inspection. They voluntarily consented to all aspects of the inspectional operations.

BEST COPY AVAILABLE

Exhibit B, Laboratory Reports.

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A & G Company
Jersey City, N.J.
EI 2/23/75 LHR

DISCUSSION WITH MANAGEMENT

There was no other discussion with management other than that which furnished information contained in this report.

EXHIBITS

The following exhibits accompany this report.

- 1 - 5 The five FD-482 Notices of Inspection
- 6 - Assignment memo
- 7 - Affidavit by Wafa Ghaly
- 8 - Affidavit by Adel Ghaly
- 9 - Recall Notification posted at A & G Company

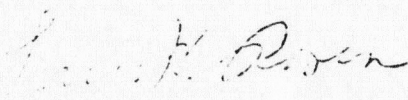

LOUIS H. ROSEN
Investigator
Newark District

Exhibit B, Laboratory Reports.

PAGE 1 OF 2

ANALYST WORK SHEET		1. PRODUCT Fish		2. SAMPLE NUMBER 052-453H	
3. SEALS <input type="checkbox"/> BROKEN <input checked="" type="checkbox"/> INTACT <input checked="" type="checkbox"/> NONE		4. DATE RECD 2-27-75		5. RECEIVED FROM LEONARD MESTRANDREA	
6. DISTRICT OR DIVISION N+K		7. DESCRIPTION OF SAMPLE THE SAMPLE CONSISTED OF A PLASTIC JUG CONTAINING FIVE WHOLE FISH IMMersed IN LIQUID.			
8. NET CON- TENTS <input checked="" type="checkbox"/> NOT APPLICABLE <input type="checkbox"/> NOT DETERMINED <input type="checkbox"/> UNITS EXAMINED		<input type="checkbox"/> DECLARED AMOUNT FOUND % OF DECLARED		9. LABEL- ING <input type="checkbox"/> ORIGINAL(S) SUBMITTED <input type="checkbox"/> COPIES SUBMITTED <input type="checkbox"/> NONE LABEL QUOTED BELOW	
10. SUMMARY OF ANALYSIS					
<p><u>CONTAINER</u>: CYLINDER-SHAPED PLASTIC CONTAINER MEASURING 17" IN HEIGHT AND 8" IN DIAMETER WITH A PLASTIC SCREW CAP</p> <p><u>LABEL</u>: THE LABEL ON THE PLASTIC CONTAINER READS "KRINOS BRAND SELECTED GREEK GREEN CRACKED OLIVES IN BRINE... NET WT. 30 LBS... PRODUCT OF GREECE... IMPORTER AND DISTRIBUTED BY KRINOS FOODS INC... NEW YORK, N.Y. 10013... USA-MONTREAL TORONTO, CANADA... PORT SAID MARIO</p> <p><u>CODE</u>: NONE</p> <p><u>PRODUCT</u>: WHOLE FISH IN LIQUID</p> <p><u>ANALYSIS</u>: <u>CLOSTRIDIUM BOTULINUM</u> PREFORMED TOXIN</p> <p><u>METHOD</u>: B.A.M. 3RD EDITION 1972 SECTION XI</p> <p><u>UNITS TESTED</u>: A PORTION OF EACH OF THE FISH WAS COMPOSITED AND TESTED.</p> <p><u>RESULTS</u>: PREFORMED <u>CLOSTRIDIUM BOTULINUM</u> TOXIN TYPE "E" WAS DETECTED IN THE SAMPLE COMPOSITE TESTED. TYPE "E" TOXIN WAS IDENTIFIED BY TOXIN NEUTRALIZATION TESTING.</p>					
11. RESERVE SAMPLE ONE PLASTIC CONTAINER OFFICIALLY SEALED "052-453H, 2-28-75, JOHN P. SCHRADER" CONTAINING FISH IN LIQUID WAS RETURNED TO THE SAMPLE CUSTODIAN.					
12. DATE REPORTED 3-4-75		13a. ANALYST(S) NAME John P. Schrader Leonard Mestrandrea		13b. NUMBER 548 575	
				13c. PC 14. CALCULATIONS CHECKED 5 1	
15. PROGRAM DATA		OPERATION		METHOD (Check no more than two)	
EXAMS 1. 05 2. 0003 3. 018		H.S./DEC NO. BF 320177		(A) <input type="checkbox"/> MACROSCOPIC (M) <input type="checkbox"/> MICROSCOPIC (X) <input type="checkbox"/> X-RAY (F) <input type="checkbox"/> FIELD EXAM (P) <input type="checkbox"/> PHY EXAM (B) <input checked="" type="checkbox"/> BACT (O) <input type="checkbox"/> ORGAN (C) <input type="checkbox"/> CHEM (N) <input type="checkbox"/> W/O ANAL (L) <input type="checkbox"/> BIO	

Exhibit B, Laboratory Reports.

From

058-953 H

2-22-75 ANALYSIS INITIATED ACCORDING TO THE METHODOLOGY
CITED.

John P. Schrade
3-4-75

MEDIA QUALITY ASSURANCE

COOKED MEAT MEDIA - BBL 201527

TPGY MEDIA - 48

BOTULINUM ANTITOXIN TYPE A - DATE 7-8-71 LOT 2 CDC
TYPE B - DATE 9-28-64 LOT 3 CDC
TYPE E - DATE 10-14-63 LOT 1 CDC

GEL PHOSPHATE - 51

EXPOSURE PLATES NEGATIVE FOR GROWTH.

John P. Schrade
3-4-75

Exhibit B, Laboratory Reports.

— 2400457

Fisd

PAGE 2 OF 2 PAGES

SAMPLE NUMBER

059-953 H

METHOD OF PREPARATION

APPROXIMATELY 50 GRAMS WAS TAKEN FROM EACH OF THE FIVE FISH AND BLENDED WITH AN EQUAL PORTION OF THE BRINE SOLUTION. THE SAMPLE COMPOSITE WAS CENTRIFUGED AT 20,000 RPM'S FOR 30 MINUTES. THE SUPERNATE WAS DRAWN OFF AND FILTERED, THE PH ≈ 6.5 . DILUTIONS WERE PREPARED USING GEL PHOSPHATE AND MICE INOCULATED.

COOKED MEAT AND TPGYT MEDIA WERE EACH INOCULATED WITH A PORTION OF THE SAMPLE COMPOSITE.

[illegible]

Exhibit B, Laboratory Reports.

1. ANALYST OR COLLECTOR		2. SAMPLE NUMBER	
D. J. K. (P. 100)		052-753 H	
3. DATE RECEIVED	4. DATE RECEIVED FROM	5. DISTRICT OR DIVISION	
2-25-75	N.Y. DC	DM	
6. DESCRIPTION OF PRODUCT			
Received by "Spout Eastern Airline" at 12 noon, one carton ice containing 1 plastic bag with 2 small fish plus a white bag containing approx. 600g of the brain.			
7. NET CONTENTS		8. LABELING	
<input type="checkbox"/> NOT APPLICABLE DECLARED FOUND: 1 % OF DECLARED		SUBMITTED: <input type="checkbox"/> CRIG <input type="checkbox"/> NONE <input type="checkbox"/> COPIES	
9. SUMMARY OF ANALYSIS			
<p><u>Experimental:</u> 50g of fish meat were blended with 70 ml of the brain and centrifuged in the cell @ 7000 RPM for 40 minutes.</p> <p>A portion of the supernatant was used to inject mice, I.P., 0.5 ml into each of 2 mice per each dilution; mice unprotected and mice protected with monovalent <i>C. botulinum</i> antitoxins types A, B & E.</p> <p>A portion of the supernatant was typhimized at 1% final concentration and then injected into mice on the same schedule as above.</p> <p>Another portion of supernatant was heated for 10 minutes and 0.5 ml undiluted material injected into each of 2 mice.</p> <p>Approx. 2 g of fish meat were inoculated into each of 3 tubes of Tryptone-Pyruvate-Glucose Yeast Extract (TPGY) broth and incubated at 26°C for 5 days.</p> <p><u>Results:</u> The supernatant killed mice at 10⁴ dilution and was neutralized by <i>C. botulinum</i> type E antitoxin.</p> <p>Following 5 days incubation at 26°C the TPGY cultures killed mice at 10⁴ dilution and were neutralized by <i>C. botulinum</i> type E antitoxin.</p>			
10. RESERVE SAMPLE			
Refrigerator			
11. DATE REPORTED	12. ANALYST'S NAME	13. NO.	14. BY
3/11/75	D. J. K. (P. 100)		
	J. M. G. (P. 100)		
15. PROGRAM DATA		16. METHOD (Check the appropriate box)	
CALIBRATION 411 ACTIVITY 1.1		(A) <input type="checkbox"/> MACROSCOPIC (S) <input type="checkbox"/> MICROSCOPIC (X) <input type="checkbox"/> X-RAY (F) <input type="checkbox"/> FIELD EXAM (P) <input type="checkbox"/> PHY EXAM (B) <input type="checkbox"/> LACT (O) <input type="checkbox"/> ORGAN (C) <input type="checkbox"/> CHEM (N) <input type="checkbox"/> W/O ANAL (L) <input type="checkbox"/> BIO	

Exhibit B, Laboratory Reports.

Fish (Dover)		PAGE 2 OF 5	PAGES 5	052-953 H					
METHOD OF PREPARATION: 50g of fish were blended with 70 ml of brine and centrifuged in the cold @ 7000 RPM for 40 minutes.									
① A portion of the supernatant was used to inject mice, I.P., 0.5ml into each of 2 mice per dilution, mice unprotected and mice protected with mono-valent <i>C. botulinum</i> antitoxin types A, B and E.									
② A portion of the supernatant was trypsinized at 1% concentration and injected into mice on the same schedule as above.									
③ Another portion of supernatant was heated for 10 minutes and 0.5ml undiluted injected into each of 2 mice.									
ANALYST(S)				DATE					
SUB NO.	TOXICITY SCREENING TEST	NEUTRALIZATION						SUMMARY	
		UNPROTECTED		PROTECTED					
① Trypsinized		P	R	G	-A	-B	-E	Type E toxin	
		10 ⁻¹	10 ⁻²	10 ⁻³	10 ⁻¹	10 ⁻²	10 ⁻³		
		2	2	2	2	2	2		1
② Heated								Type E toxin	
		10 ⁻¹	10 ⁻²	10 ⁻³	10 ⁻⁴	10 ⁻⁵			
		2	2	2	2	0			
-A	P	R	G	C					
		10 ⁻¹	10 ⁻²	10 ⁻³	10 ⁻⁴	10 ⁻⁵			
		2	2	2	2	0			
-B									
		10 ⁻¹	10 ⁻²	10 ⁻³	10 ⁻⁴	10 ⁻⁵			
		2	2	2	1	0			
-E									
		10 ⁻¹	10 ⁻²	10 ⁻³	10 ⁻⁴	10 ⁻⁵			
		0	0	0	0	0			
③ Heated									
		10 ⁻¹	10 ⁻²	10 ⁻³	10 ⁻⁴	10 ⁻⁵			
		2							
③ Injected with very viscous material with large milled - maybe cause of death									
NUMBER OF DEAD MICE OUT OF INOCULATED									

Culture Record

Date Cultured 2-25-75

Preparation: Pieces of fish and/or 2ml brine

Inoculum size 2 gr Vol. of Medium 15 ml

Incubation temperature 26°C

Date Examined 3-4-75

Analyst(s)

Analytic No.

Exhibit B, Laboratory Reports.

PRODUCT TOXIN FROM (LIGULE)	PAGE OF PAGES 4	SAMPLE NUMBER 005-46217
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METHOD OF PREPARATION 5 DAY OLD TON BATH CULTURES AT 26°C.

1. 2 ALIQUOTS FROM EACH OF TWO CULTURES WERE TRANSFERRED.
2. SERIAL OF 10¹⁰, 10⁹, 10⁸, 10⁷, 10⁶ DILUTION OF EACH CULTURE WAS INJECTED INTO EACH OF TWO PROTECTED AND EACH OF TWO UNPROTECTED MICE.
3. MICE WERE PROTECTED WITH MONOVALENT TYPE E ANTISERUM.

ANALYST(S)													DATE																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																										
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* NUMBER OF DEAD MICE OUT OF 2 INOCULATED

... of ... **E**

20 6034 234 10/701

Exhibit B, Laboratory Reports.

ANALYST WORK SHEET		1. PRODUCT <u>FISH</u>		2. SAMPLE NUMBER <u>INN C-54-953H</u>	
3. SEALS <input type="checkbox"/> BROKEN <input checked="" type="checkbox"/> INTACT <input checked="" type="checkbox"/> NONE		4. DATE RECD <u>3-4-75</u>		5. RECEIVED FROM <u>LEONARD MESTRANDREA</u>	
6. DISTRICT OR DIVISION <u>NYK</u>		7. DESCRIPTION OF SAMPLE <u>TWO TUBES OF COOKED MEAT MEDIA AND TWO TUBES OF TPGYT MEDIA INOCULATED WITH A PORTION OF THE FISH WERE SUBJECTED TO ANALYSIS FOR THE RECOVERY OF CULTURAL BOTULINUM TOXIN AND THE C. BOTULINUM ORGANISM.</u>			
8. NET CON- TENTS <input checked="" type="checkbox"/> NOT APPLICABLE <input type="checkbox"/> NOT DETERMINED <input type="checkbox"/> UNITS EXAMINED		9. DECLARED AMOUNT FOUND _____ % OF DECLARED _____		9. LABEL- ING <input type="checkbox"/> ORIGINAL(S) SUBMITTED <input type="checkbox"/> COPIES SUBMITTED <input checked="" type="checkbox"/> NONE *SEE ORIGINAL ANALYSIS	
10. SUMMARY OF ANALYSIS					
<u>CONTAINER</u> <u>LABEL</u> <u>CODE</u> <u>PRODUCT</u>		TWO TUBES OF COOKED MEAT MEDIA & TWO TUBES OF TPGYT MEDIA - EACH OF THE FOUR TUBES INOCULATED WITH A PORTION OF THE FISH PRODUCT - WERE SUBJECTED TO ADDITIONAL ANALYSIS.			
<u>ANALYSIS:</u> <u>CLOSTRIDIUM BOTULINUM</u> CULTURAL TOXIN AND <u>C. BOTULINUM</u> MICROORGANISM					
<u>METHOD:</u> B.A.M. 3 RD EDITION 1972 SECTION <u>XI</u>					
<u>UNITS TESTED:</u> TWO TUBES EACH OF COOKED MEAT & TPGYT MEDIA					
<u>RESULTS:</u> <u>CLOSTRIDIUM BOTULINUM</u> TOXIN TYPE "E" WAS DETECTED IN BOTH THE COOKED MEAT AND TPGYT CULTURE MEDIA. TYPE "E" TOXIN WAS IDENTIFIED BY TOXIN NEUTRALIZATION TESTING. THE RECOVERY OF THE <u>C. BOTULINUM</u> MICROORGANISM FROM THE CULTURE MEDIA WAS NOT POSSIBLE DUE TO THE PROBABLE DEATH OF THE ORGANISM.					
11. RESERVE SAMPLE <u>NO RESERVE</u>					
12. DATE REPORTED <u>3-13-75</u>		13. ANALYST(S) NAME <u>John P. Schrock</u>		13b. NUMBER 13c. PC <u>598</u> <u>15</u>	
				14. CALCULATIONS CHECKED <u>15</u>	
				15. BY <u>15</u>	
				16. DATE <u>15</u>	
15. PROGRAM DATA					
OPERATION <u>2</u> METHOD (Check no more than two) (A) <input type="checkbox"/> MACROSCOPIC (M) <input type="checkbox"/> MICROSCOPIC (X) <input type="checkbox"/> X-RAY (F) <input type="checkbox"/> FIELD EXAM (P) <input type="checkbox"/> PHY EXAM (B) <input checked="" type="checkbox"/> BACT (O) <input type="checkbox"/> ORGAN (C) <input type="checkbox"/> CHEM (N) <input type="checkbox"/> W/O ANAL (L) <input type="checkbox"/> BIO					
1. <u>013</u> <u>010</u> <u>02</u> <u>BF</u> <u>3</u> <u>2</u> <u>0</u> <u>1</u> <u>7</u> <u>7</u> <u>0</u> <u>5</u> <u>3</u>					
2. <u>0</u> <u>0</u> <u>0</u> <u>0</u> <u>0</u> <u>0</u> <u>0</u> <u>0</u> <u>0</u> <u>0</u> <u>0</u> <u>0</u> <u>0</u>					
3. <u>0</u> <u>0</u> <u>0</u> <u>0</u> <u>0</u> <u>0</u> <u>0</u> <u>0</u> <u>0</u> <u>0</u> <u>0</u> <u>0</u> <u>0</u>					

Exhibit B, Laboratory Reports.

FISH

INV 058-953 H

3-4-75

ANALYSIS INITIATED FOR TOXIN DETECTION AND
RECOVERY OF MICROORGANISM.NO TYPICAL COLONIES FOR C. BOTULINUM ORGANISM
WERE DETECTED ON ANAEROBIC EGG AGAR STREAKED
FROM THE COOKED MEAT & TPGYT CULTURE MEDIA.John P. Schwade
3-13-75MEDIA QUALITY ASSURANCE

COOKED MEAT - BBL 201527

TPGYT - 48

BOTULINUM ANTITOXIN TYPE E - DATE 10-14-63 LOT 1 CDC

GEL PHOSPHATE - 51

ANAEROBIC EGG AGAR - 48

PRODUCT	FISH	PAGE 2 OF 2 PAGES	SAMPLE NUMBER INV 058-953H
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METHOD OF PREPARATION

THE COOKED MEAT MEDIA WAS INCUBATED FOR 5 DAYS AT 35°C AND THE TPGYT MEDIA FOR 5 DAYS AT 25°C. A PORTION OF EACH OF THE CULTURES WAS WITHDRAWN AND CENTRIFUGED AT 20,000 RPM'S FOR 30 MINUTES. THE SUPERNATE WAS DRAWN OFF AND FILTERED, THE pH 6.5. DILUTIONS WERE PREPARED USING GEL PHOSPHATE AND MICE INOCULATED.

ANALYST(S)

JOHN P. SCHRADER

DATE

[illegible]

NUMBER OF DEAD MICE OUT OF 2 INOCULATED

United States Court of Appeals
For the Second Circuit

Mohamed Ali and Nadia Ali

Plaintiffs-Appellants

against

A & G. Company Inc., and Saadi Ibrahim

Defendants-Appellees

AFFIDAVIT
OF SERVICE

On Appeal from the United States District Court
For the Southern District of New York

STATE OF NEW YORK,

COUNTY OF NEW YORK, ss:

Raymond J. Braddick, agent for Harry H. Lipsig Esq.

being duly sworn,

deposes and says that he is over the age of 21 years and resides at

Levittown, New York

That on the 10th. day of May, 1970

he served the annexed Brief

upon

1. Leahy & Johnson Esqs.
Attorneys for Defendant-Appellee
A & G. Company Inc.,
120 Wall Street
New York, New York
2. Norman C. Harlowe
Attorney for Defendant-Appellee
Saadi Ibrahim
401 Broadway
New York, New York

in this action, by delivering to and leaving with said attorneys

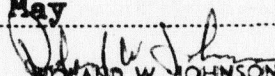
two ~~three~~ true copies to each thereof.

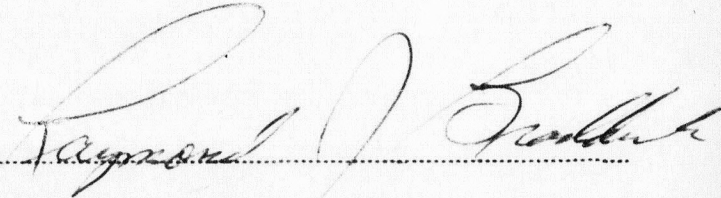
DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this **10th.**

day of **May**, 197**6**


ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977

} 

Services of ^{Two (2)}~~three (3)~~ copies of
the within _____ is
hereby admitted this _____ day
of _____, 197

Attorney for

Services of ^{Two (2)}~~three (3)~~ copies of
the within _____ is
hereby admitted this _____ day
of _____, 197

Attorney for